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No. 503

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

DENVER CHICAGO TRANSPORT COMPANY, INC.,
Appellant,
vs.
UNITED STATES OF AMERICA
and
INTERSTATE COMMERCE COMMISSION,
Appellees

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

BRIEF OF APPELLANT OPPOSING MOTION TO AFFIRM.

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BRIEF OF APPELLANT OPPOSING MOTION TO AFFIRM

As provided for by Rule 16 of the Revised Rules of this Court, Appellant submits this brief in opposition to the motion of the United States of America and the Interstate Commerce Commission[1] to affirm the judgment of the District Court.

STATEMENT

The opinion of the United States District Court for the District of Colorado from which this appeal is taken and the involved decisions and orders of the Interstate Commerce Commission reviewed in the Court below are reproduced in the Jurisdictional Statement (J.S.). The Jursdictional Statement also sets forth the questions presented by the appeal and the statutory grounds conferring jurisdic-

[1] Hereinafter sometimes referred to collectively as the Government.

tion in this Court, together with authorities sustaining such jurisdiction. The Government has not challenged the jurisdiction of this Court in the appeal.

Appellant has fully summarized the relevant facts of the case in its Jurisdictional Statement. That statement is relied upon in this brief. The facts as stated by the Government in its Motion to Affirm are not in substantial disagreement. In characterizing the proceedings before the Commission, however, the Government does not clearly disclose the significant fact that in *Collett Tank Lines v. R. B. "Dick" Wilson, Inc.*, 78 M.C.C. 369,[2] the Commission, on its own motion, reopened all the proceedings in which Appellant acquired its certificates for consolidated oral hearing and the reception of evidence going to the issues involved in the interpretation of Appellant's operating authority.

In this brief, Appellant respectfully requests that the Court also consider the arguments presented under that portion of the Jurisdictional Statement entitled "The Questions Are Substantial." An effort will be made herein only to join issues on specific contentions raised by the Government in its Motion to Affirm, and to supplement, where applicable, the argumentative portion of the Jurisdictional Statement.

SUMMARY OF ARGUMENT

The commodity description "petroleum products" in Appellant's certificates of public convenience and necessity must be interpreted in the light of an official, specialized usage of the term by the Commission and the motor carrier industry during the period when the certificates were issued. This is not a case to be government by the plain meaning of words in the English language, nor abstract distinctions between a commodity and its products.

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[2] Jurisdictional Statement, Appendix "C".

CRUDE OIL WAS DEFINITIVELY CLASSIFIED BY THE COMMISSION AS A PETROLEUM PRODUCT DURING THE PERIOD IN WHICH APPELLANT ACQUIRED ITS CERTIFICATES

During the period in which Appellant's operating rights were issued the Commission had definitively classified crude oil as a petroleum products for the purpose, among others at least, of describing the scope of commodity authorizations to be contained in certificates. This classification was made in an *ex parte* rule making proceeding after careful consideration and extensive conferences with members of the motor carrier industry. The classification was subsequently published as an official Motor Carrier Regulation of the Commission. Thereafter, during the years in which Appellant's certificates were granted, the Commission, in numerous decisions and orders, applied the classification as definitive of commodity authorizations. The Commission's present interpretation of Appellant's authorization to transport petroleum products as excluding the transportation of crude oil is manifestly contrary to its own definitive classification and official regulation. Therefore it is clearly erroneous.

IN OFFICIAL COMMISSION USAGE CONTEMPORANEOUS TO THE ISSUANCE OF APPELLANT'S CERTIFICATES CRUDE OIL WAS REGARDED AS A PETROLEUM PRODUCT

Entirely apart from the official classification of crude oil as a petroleum product, numerous other decisions and orders of the Commission disclose that, at the times when Appellant's certificates originated, crude oil was regarded by the Commission as a petroleum product. Those decisions and orders, together with the official language employed in other certificates, establish that the generic description "petroleum products" had a specialized meaning within

the motor carrier industry which included the commodity crude oil. In issuing Appellant's certificates for the transportation of petroleum products, the Commission intended to authorize the transportaton, among other commodities, of crude oil, and its conclusion now to the contrary is clearly erroneous.

THERE IS NOT SUBSTANTIAL EVIDENCE OR A RATIONAL BASIS IN THE RECORD TO SUPPORT THE FINDING OF THE COMMISSION THAT APPELLANT'S CERTIFICATES WERE NOT INTENDED TO AUTHORIZE THE TRANSPORTATION OF CRUDE OIL

The determination of the Commission's intent in utilizing the description "petroleum products" in Appellant's certificates cannot be made by an atomization of the evidence in the "grandfather" and other underlying authorization proceedings in an attempt to show that Appellant did not establish a basis for a grant of specific crude oil operating authority. The evidence in this proceeding, and other factors improperly treated by the Commission as evidence, do not afford a substantial or rational basis for the finding that Appellant's certificates were not intended to authorize the transportation of crude oil. Neither the technical dictionary definitions nor the allegedly expert testmony relied upon by the Commission were related in time to the issuance of Appellant's certificates or to usage of the phrase "petroleum products" in the motor carrier industry. They are therefore irrelevant and of no probative value in this proceeding.

ARGUMENT

As a preliminary matter, it is wholly incorrect to assume, as does the Government in its Motion to Affirm (Motion, 4), that this is a case to be controlled by any language

in *Andrew G. Nelson, Inc. v. United States et al*, 355 U.S. 554, 78 S. Ct. 496, 2 L. Ed. 2d 484 (1958). It is conceded that in the interpretation of a certificate of public convenience and necessity, "the plain meaning of words in a commodity description is controlling in the absence of ambiguity or specialized usage in the trade."[3] Also, as is fairly stated by the Government, Appellant does not contend that there is anything *patently* ambiguous in the certificates under scrutiny. But there the concessions must cease. Appellant does most strongly urge that at the times when the involved certificates were issued the specialized usage of the phrase "petroleum products" by the Commission and the motor carrier industry clearly established that crude oil was then regarded as a petroleum product. Indeed, Question Number II of the questions presented by this appeal (J.S. 3) is concerned solely with the issue of "specialized usage" or a "term of art" within the meaning of the *Nelson* case. By reference to contemporaneous official proceedings before the Commission, other certificates of public convenience and necessity, and the Commission's own rules and regulations, it will be shown that, whatever the ordinary or the present meaning of "petroleum products" may be, during the period when Appellant acquired its certificates crude oil was considered a petroleum product within the motor carrier industry. It is fundamental, of course, that language in a certificate will be construed in light of how it was understood at the time the certificate was issued. *United States et al v. Seatrain Lines, Inc.*, 329 U.S. 424, 429, 67 S.Ct. 435, 91 L. Ed. 396 (1947) and cases cited in Jurisdictional Statement, page 10.

With apparent reference to Appellant's statement that its arguments are not based on semantical grounds (J.S. 9), the Government asserts that the distinction in ordinary English usage between a commodity and its product is

[3] *Nelson, supra*, at 557.

therefore unchallenged (Motion, 4). The short answer, of course, is that we are not here concerned with ordinary English usage, but rather with the meaning of the phrase "petroleum products" as used and intended by the Commission and the motor carrier industry when Appellant's certificates were granted. As will be made clear in this brief, the Commission never construed the commodity description "petroleum products" to exclude crude oil until long after Appellant acquired its certificates. Instead, in numerous decisions and orders, the Commission made clear that it regarded crude oil as included in the "petroleum products" description.

Finally, and perhaps the most cogent reason why the ordinary English language rationale is inapplicable to this case, is the fact that the Commission, exercising its rule making function, had definitively classified crude oil as a petroleum product during the period when Appellant's certificates were issued. It is to this point, presented in Question I of the Jurisdictional Statement, that attention will now turn.

CRUDE OIL WAS DEFINITIVELY CLASSIFIED BY THE COMMISSION AS A PETROLEUM PRODUCT DURING THE PERIOD IN WHICH APPELLANT ACQUIRED ITS CERTIFICATES.

On August 9, 1937, prior to the issuance of any of Appellant's certificates, the Commission, Division 5, in *Ex Parte* No. MC-10, *Classification of Motor Carriers of Property*, 2 M.C.C. 703, 709-714, classified the operations of motor carriers with reference to seventeen "Types of Groups of Commodities" transported. The fourth such commodity group was defiined:

> "(4) *Carriers of liquid petroleum products.*—Carriers of liquid petroleum products include those carriers

who transport such petroleum products as gasoline and other liquid motor fuel, road oil, *crude oil*, fuel oil, kerosene, and like products in tank vehicles or drums . . . ." (Emphasis added)[4]

As has been pointed out in the Jurisdictional Statement and authorities cited therein the *Classification* case was an exercise of the Commission's rule-making authority (J.S. 11). The commodity classifications set forth therein were published verbatim as official Motor Carrier Regulations in the *Federal Register* and codified in the *Code of Federal Regulations* as regulations of "general applicability and legal effect", and as such are fully binding upon the Commission (J.S. 11, 12).

In the reopened proceedings below, Division 1 of the Commission held (J.S. 60) that the *Classification* case was decided in the formative period of motor carrier regulation, at which time a need was apparent for the grouping of carriers prior to the establishment of safety, accounting, and other regulations, and the case contains "no language which may be fairly construed as making commodity descriptions subject to the definitions set forth therein." The District Court upheld the Commission on this point (J.S. 26, 27), adding that a reading of the entire categorization of commodity group (4), which includes "edible oils, coal-tar products, and chemicals," and specifically excludes certain "perishable liquid products which require temperature control," indicates that the Commission intended to provide for the regulation of tank vehicles, rather than to provide a definitive commodity description.

But the intention of the Commission in the *Classification* case cannot be determined from a reading of the petroleum products commodity group alone, and completely contrary to the conclusion of the Commission, there is in-

[4] 2 M.C.C. 703, 710.

deed much in the language of that case which, fairly construed, compels the conclusion that certain generic commodity descriptions were intended to be expressed in the classifications. The Commission itself stated the following as one of the purposes to be served by the classifications:

> "It is obvious that such classification is particularly important at this time in connection with the *issuance of certificates*, permits and licenses, as it will *facilitate the identification and description of the operations to be covered thereby.*" (Emphasis added)[5]

Much in the same vein, the Commission, in expounding the purposes to be served by the *Classification* case, was "impressed" with the necessity of providing a "satisfactory operating sphere for each kind and major type of operator now in existence."[6] In explanation of the seventeen "Types of Groups of Commodities," the Commission stated:

> "The third division on the chart describes the type of commodities transported by the carrier."[7]

A reading of the *Classification* case in its entirety fully justifies the conclusion that at least one of the purposes of the Commission was to describe the generic commodity authorizations to be issued to the several classes of carriers defined. This conclusion is not impaired in the least by the possibility that the Commisson may have acted also in response to a then apparent need for a classification of carriers prior to the establishment of safety, accounting, and other regulations. The two purposes would not seem at all incompatible. Significantly, the Government now appears to take the position that the "primary" purpose of the case was to provide for such regulation (Motion, 5), but

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[5] 2 M.C.C. 703.
[6] 2 M.C.C. 703.
[7] 2 M.C.C. 706.

that contention does not in any manner deny that the scope of certain general commodity descriptions was also defined.

During the period in which Appellant acquired its certificates, the *Classification* case was relied upon in numerous Commission decisions for the purpose of describing or defining the scope of commodity authorizations. Rather than burden this brief with extensive citations, a chronological list of such decisions, intended to be neither exhaustive nor selective, has been appended hereto as Appendix A. All of the cases cited in the Appendix are related in time to the proper interpretation of Appellant's certificates and reflect instances in which the Commission applied the *Classification* case as definitive of the commodities embraced within a particular commodity description or determinative of a particular type of carrier service. One of those cases, *Consolidated Freight Lines, Incorporated, Common Carrier Application*, 11 M.C.C. 131, warrants special attention here since it contains specific references to the petroleum products classification and discloses the reliance of both the Commission and the motor carrier industry on that particular generic commodity definition.

> "Commodities.—Based upon the carrier designations set out in Classification of Motor Carriers of Property, 2 M.C.C. 703, applicant seeks a certificate authorizing it to operate as a common carrier of property. . . It requests authority to transport commodities under group 1, general freight; group 3, heavy machinery; group 4, liquid petroleum products; group 6, refrigerated solid products; group 9, motor vehicles; and group 17, specific commodities not subgrouped, particularly livestock."
>
> • • •
>
> "Although applicant owns and operates tank trucks, no proof was submitted that group 4 commodities,

liquid petroleum products, have been transported therein in interstate or foreign commerce. The authority sought in this respect is therefore denied.'"[8]

The policy of official reliance on the *Classification* case which is evident in the cases cited in Appendix A may, possibly have been brought to an end[9] in *Coastal Tank Lines, Inc. et al v. Charlton Bros. Transportation Company*, 48 M.C.C. 289, decided June 4, 1948.

The dramatic effect of *Coastal Tank Lines* can be best appreciated in connection with a brief review of three other very illuminating Commission decisions involving the effect of the *Classification* case.

In *Watson—Purchase—Comet Motor Express Co.*, 40 M.C.C. 735, decided May 22, 1946, Watson applied to the Commission for authority to purchase certain operating authority from Comet, including a certificate authorizing the transportaton of general commodities, without exceptions, between Craig, Colorado and Casper, Wyoming. Under the agreement of sale, Comet was to retain that portion of its certificated general commodity authority which would, it was thought, allow the transportation of bulk petroleum products between Craig, Colorado and Casper, Wyoming. Athough it noted that Comet had already contracted to sell the purportedly retained petroleum products authority to another carrier, the Commission, invoking

[8] 11 M.C.C. 131, 133, 134

[9] If the *Classification* case is indeed no longer definitive, it retains a surprising vigor as at least "a guide in the issuance of authorities." *Petroleum Carrier Corporation et al v. Black*, 51 M.C.C. 717, 721, 722 (1950). In *Petroleum-Union Cartage Company*, 309 I.C.C. 333, 334, 335, decided January 6, 1960, the Commission noted that the *Classification* case had "established a number of classifications and groupings of motor carriers based on the types of commodities transported." From that springboard, the Commission determined that a particular motor carrier was without authority to transport petroleum products, in bulk, in tank vehicles, for the reason, *inter alia*, that the service of the carrier was that of the type defined in the "carriers of heavy machinery" group of the *Classification* case.

the *Classification* case, held that the unrestricted general commodities authority owned by Comet had never authorized the transportation of petroleum products in bulk. Therefore, if the sale to Watson were consummated, Comet would retain no rights under the certificate.

> "In *Classification of Motor Carriers of Property*, 2 M.C.C. 703, the Commission, division 5, had under consideration the classification of motor carriers of property, and, after discussing the need for such classification, defined 'carriers of general freight' as that group, comprising both common and contract carriers, 'transporting commodities generally, except such commodities as require special equipment or service.' It is apparent that transportation of petroleum products, in bulk, is a specialized service, involving use of a special type of equipment in transporting a limited group of commodities for a particular class of shippers. In our opinion vendor's certificate, authorizing the transportation of general commodities, does not include the right to transport petroleum products in bulk. Accordingly, if the authority herein granted is exercised, all of vendor's rights to operate between Craig and Casper via Rawlins, under its certificate . . . will be acquired by vendee."[10]

In *C & U Tank Lines, Inc.—Purchase Comet Motor Express Co.*, decided October 3, 1946, 45 M.C.C. 175, Comet, the same vendor appearing in the *Watson* case, proposed to sell that remaining portion of its unrestricted general commodity authority which supposedly would authorize the transportaton of petroleum products in bulk, between Salt Lake City, Utah and Craig, Colorado, and between Grand Junction and Craig, Colorado, together with the petroleum products authority between Craig, Colorado and Casper,

[10] 40 M.C.C. 735, 737 - 738.

Wyoming which it had purported to exclude from the sale of general commodities authority in the *Watson* case. Relying on its previous *Classification* case rationale in *Watson*, the Commission dismissed the application, holding:

> "The remainder of the rights granted in No. M.C.-691, to transport general commodities between Grand Junction and Craig and between Salt Lake City and Craig, are subject to the identical lack of authority to transport petroleum products, in bulk, found in the *Watson* case as to the Craig-Casper segment. It follows that Comet holds no authority to transport petroleum products, in bulk, over any of the routes which are the subject of the instant transaction . . ."[11]

Coastal Tank Lines, Inc., et al v. Charlton Bros. Transportation Company, Inc., decided June 4, 1948, 48 M.C.C. 289, involved a complaint proceeding against Charlton alleging the unlawful transportation of petroleum products, in bulk, in tank vehicles, under a certificate authorizing the transportation of general commodities without restriction. Defendant admitted the transportation of petroleum products, but like Comet in the two previous decisions, contended that authority to transport general commodities necessarily included the right to transport petroleum products in bulk. Noting that its previous decisions in *Watson* and *C & U* did not appear reconcilable, the Commission nevertheless held that the definition of carriers of general commodities as set forth in the *Classification* case was not controlling on the certificate of Coastal and dismissed the complaint.

Thereafter, on June 23, 1949, the Commission reopened the proceedings in *C & U Tank Lines, Inc.—Purchase—Comet Motor Express Co.*, for reconsideration, and expressly modified its prior findings to conform with the

[11] 45 M.C.C. 175, 180-181.

decision in *Coastal Tank Lines*, holding that Comet's general commodity certificate did authorize the transportation of petroleum products in bulk.[12]

In the Government's Motion to Affirm, *Carolina Freight Carriers Corp. v. United States et al* (D.C., N.C. 1941) 38 F. Supp. 549, is cited as being in accord with the contention that the "primary" purpose of the "liquid petroleum products" grouping in the *Classification* case was not to provide a then definitive commodity description of petroleum products (Motion 5, 6). A brief analysis will show that the language of the case quoted by the Government (Motion, 6) is not only inapplicable, but when read in full context actually supports the position of Appellant.

Carolina Freight Carriers Corp. had applied to the Commission for a "grandfather" certificate authorizing the transportation of general commodities. After hearing the Commission issued a certificate, but restricted it to transportation of a few specific commodities and to service to and from certain points within the scope of the application. The Commission sought to justify the restrictions imposed, among other grounds, on the basis of the definition of a common carrier contained in 49 U.S.C. Sec. 303 (a) (14). The District Court disagreed, stating that the effect of the definition was merely to make clear that both "specialty" and "general" carriers were common carriers, and then added:

> "And we think it significant that in making classifications of carriers for the proper performance of its duties, the Commission has not attempted to classify with respect to points served or specific commodities hauled, but has defined its seventeen classes of carriers on the basis of the general business engaged in. The classification is as follows: (1) carriers of general

[12] 55 M.C.C. 791, 792.

> **[illegible] of [illegible] Under this [illegible] classified as a carrier of general freight, since it was willing to haul any freight that it was offered, outside of the specialties requiring specialized equipment, and did substantial business of this character. *Being a common carrier of general freight during the 'grandfather' period, it became entitled to a certificate on the same basis;* and we see nothing in any language of the act which justifies the Commission in limiting the certificate to the points served and the specific commodities transported." (Emphasis added)[13]**

In reversing the Commission, the Court, in *Carolina Freight Carriers*, employed the *Classification* case in a manner precisely opposed to the Government's view in the instant proceeding. As a "significant" factor, the Court in the cited case found that the plaintiff should manifestly be classified as a carrier of "general freight", as defined in the *Classification* case, and therefore should be entitled to a certificate *on the same basis*, namely general freight. By logical extrapolation of the reasoning in *Carolina Freight Carriers*, Appellant here is manifestly a carrier of "petroleum products," as defined in the *Classication case*, and should therefore be entitled to an interpretation of its certificates on that basis, which, so construed, would give it authority to transport crude oil. The *Carolina Freight Carriers* case was affirmed by this Court, 315 U.S. 475, 62 S. Ct. 722, 86 L. Ed. 971 (1942). Although the *Classification* case was not explicitly relied upon, this Court, at page 433, did state that the Commission may not atomize, product by product, the "grandfather" service of a carrier of a whole "class or classes of property."

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[13] 38 F. Supp. 549, 554.

The Government's reliance on *Willers v. United States* (D.C., S.D., 1955) 133 F. Supp. 270 (Motion, 6) is only somewhat less puzzling. There the District Court pointed to the fact that in the *Classification* case the Commission had classified motor carriers of property according to, among other things, the "type of commodities transported" (133 F. Supp. 270).

Enough has been said to establish that during the period from 1937 through 1948, at least, there existed in the motor carrier field a definitive classification of crude oil as a petroleum product. Shading its conclusion to the contrary, the District Court admitted that "doubt is cast upon" its conclusion by "numerous references which the Commission has made to the *Classifications* case when considering commodity descriptions" (J.S. 27). In the view of the District Court, the matter was "further complicated" by the stature of the commodity classifications as an official Motor Carrier Regulation of the Commission (J.S. 27). Significantly, that complication, entailing as it does all of the law concerning the binding effect of administrative regulations discussed at pages 11 and 12 of the Jurisdictional Statement, was never resolved by the District Court (J.S. 27), and remains, in our opinion, a basic invalidity in the opnion of the Court. Manifestly, the Commission having interpreted Appellant's certificates contrary to its own controlling definition of petroleum products, that construction is clearly erroneous.

IN OFFICIAL COMMISSION USAGE CONTEMPORANEOUS TO THE ISSUANCE OF APPELLANT'S CERTIFICATES CRUDE OIL WAS REGARDED AS A PETROLEUM PRODUCT

A careful and extensive reading of Commission decisions involving motor carrier applications in the period during which Appellant acquired its certificates leads in-

escapably to the conclusion that both the Commission and the motor carriers then consciously regarded crude oil as a petroleum product.

Perhaps the strongest evidence that the commodity description "petroleum products" was actually intended to include crude oil is found in the language of the *Classification* case. There, following extensive conferences with the motor carrier industry and after painstaking study and refinement in expression,[14] the Commission described "carriers of liquid petroleum products" as carriers who transport "*such petroleum products as . . .* crude oil."[15] Thus, whether or not the Commission intended the *Classification* case to be definitive of commodity descriptions generally, the fact remains that crude oil was therein specifically regarded as a petroleum product. That usage is very carefully and unequivocally stated in the language employed by the Commission.

Commission usage of the term petroleum products as inclusive of the commodity crude oil is demonstrably evident in other decisions rendered during the period spaning the dates when authority was granted to Appellant. In one such class of cases, the Commission granted "petroleum products" authority based upon an established need for crude oil transportation, or to be same effect, granted a certificate for the transportation of crude oil where the application was for petroleum products.[16] These cases cannot be reconciled with the present position of the Government, since if crude oil was not then regarded as a petroleum product, the authority granted in either instance would have been beyond the scope of the application and therefore void.

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[14] 2 M.C.C. 703, 706.

[15] 2 M.C.C. 703, 710, emphasis added.

[16] Decisions cited at page 15 of Jurisdictional Statement, note 21.

Another class of cases which clearly establishes that the Commission understood crude oil to be a petroleum product is that in which certificates were granted authorizing the transportation of "petroleum products other than crude oil," or "petroleum products other than crude oil in its natural state."[17] In the proceedings below the Commission brushed aside these cases by noting that they had all involved recommended orders of examiners or a joint board which had become effective by operation of law, and holding; further, that the exception "other than crude oil in its natural state" was of no value and could well have been excluded from the certificates as having no effect (J.S. 61). The Government has adopted the same position (Motion, 6). There is no doctrine of which we are aware to support the tacit assumption that operating rights resulting from an examiner's recommended order which by operation of law[18] became effective as the order of the Commission are "second-class" certificates. Even if the theory might have some logical validity with respect to the casual terminology of an examiner's opinion in a recommended order, it fails utterly when tested against the Congressional mandate that the actual certificate issued to a motor carrier shall "specify the service to be rendered."[19] The issuance of a certificate is the culmination of the administrative function invested in the Commission. In no other phase is greater clarity and finality in the use of terminology demanded. The Commission itself has often recognized that certificates issued "should state clearly and unequivocally the service which may be performed." *Campbell Sixty-Six Express, Inc., et al v. Frisco Transportation Company, et al*, 46 M.C.C. 222. The definiteness and certainty traditionally required of words used in a statute applies equally to the language of a certificate.

[17] Cases collected, Jurisdictional Statement, page 15, note 22.
[18] 49 U.S.C. Sec. 17 (5).
[19] 49 U.S.C. Sec. 308.

It is a generally accepted rule of statutory construction that an exception of a particular thing from general words displays an intention that the thing excepted would otherwise be included within the general description.[20] The normal practice of the Commission has conformed with this rule of construction. For example, in *Home Transportation Company, Inc., Extension*, (not officially reported), 12 F.C.C. 34,178 the Commission refused specifically to except doors from the commodity description "lumber", "because to do so would imply that they would otherwise be included." Cases in which authority was granted for the transportation of "petroleum products other than crude oil" should therefore, even to the Commission, imply that, absent the exclusionary language, authority to haul crude oil would have been granted in a petroleum products certificate.

A third class of cases showing that crude oil, or petroleum, was normally considered a petroleum product in official Commission usage is that in which the transportation of "refined petroleum products" was authorized. Of the large number of such cases related in time to the issuance of Appellant's certificates, a random sampling has been set forth chronologically in Appendix B. Plainly, the qualification "refined" attached to the description "petroleum products" was intended to exclude the transportation of natural or crude petroleum from the authority granted. If as the Commission found (J.S. 63), petroleum products were then regarded as the products derived from a refinery, the "refined petroleum products" terminology in certificates would be wholly redundant, inconsistent, and confusing. More plausibly, "petroleum products" was a description which included crude oil in the then prevailing usage, and "refined petroleum products" was merely

[20] 82 C.J.S. Statutes, Sec. 382.

another way in which the Commission logically described petroleum products other than crude oil.

Many of the other decisions of the Commission dealing with the issuance of petroleum products authorities contemporaneous with those issued to Appellant support the theory that the Commission during that period used the terms petroleum products and petroleum interchangeably.[21] These cases jibe with those previously discussed in which the Commission affirmatively included crude oil as a petroleum product, and negatively, so to speak, indicate that no general distinction between petroleum and its products was then recognized in issuing certificates.

In *Descriptions in Motor Carriers Certificates*, Ex Parte No. MC-45, 61 M.C.C. 209, decided October 20, 1952, the Commission, for the first time, differentiated between petroleum and petroleum products in commodity descriptions. In doing so, the Commission stated that its findings would apply only to future certificates. (61 M.C.C. 209, 210) All of Appellant's certificates predate the *Descriptions* case. In reaching its result in the present case, therefore, the Commission has attempted to give retroactive effect to a change in policy that was specifically intended to operate only prospectively. To say that the Commission has merely interpreted the rights which Appellant possessed from the beginning is a mere *gratis asseritur*. No decision relevant in time to Appellant's certificates supports such an assertion. On the other hand, the interpretation of the Commission is squarely at odds with its own definitive decisions and regulations and the meaning which it clearly attached to the term "petroleum products" prior to the *Descriptions* case. As such, its interpretation is clearly erroneous.

[21] See, for example: *Hutchinson Transportation Company Common Carrier Application*, 19 M.C.C. 433; *Ellington Brothers, Limited, Common Carrier Application*, 10 M.C.C. 142; *Dugan Extension of Operations — Nebraska Points*, 26 M.C.C. 233.

Being so, it has effectuated the same sort of unlawful revocation of operating rights condemned in *United States et al v. Seatrain Lines, supra.*

THERE IS NOT SUBSTANTIAL EVIDENCE OR A RATIONAL BASIS IN THE RECORD TO SUPPORT THE FINDING OF THE COMMISSION THAT APPELLANT'S CERTIFICATES WERE NOT INTENDED TO AUTHORIZE THE TRANSPORTATION OF CRUDE OIL

The issue as to the substantiality of evidence to support the Commission's finding that Appellant's certificates, at the time of the grant thereof, were not intended to authorize the transportation of crude oil (J.S. 64) is apparently in need of further clarification. The Government's argument tends still, as happened in the opinions of the Commission (J.S. 57-59) and District Court (J.S. 28-30), to obscure the real pertinence of the evidence in the reopened proceeding before the Commission. The question presented is not whether there was evidence in the underlying "grandfather" and extension proceedings which would have warranted a specific grant of crude oil authority to Appellant. Contrary to the Government's apparent understanding of the case, Appellant is not concerned with the evidence in the earlier "authorization proceedings." (Motion, 7) Rather, the issue is whether the evidence introduced in this proceeding before the Commission affords substantial support for the conclusion that the authority acquired by Appellant was not then intended to authorize the transportation of crude oil. Stated differently, the inquiry here is simply whether the evidence of record adequately supports the conclusion of the Commission, affirmed by the District Court, that crude oil was not *regarded* as a petroleum product when Appellant's authority was granted. If it was so regarded, then whether there was

specific evidence in the underlying proceedings to sustain an authorization to transport crude oil is irrelevant, and Appellant should now be entitled to transport all petroleum products, including crude oil. *United States et al v. Carolina Freight Carriers Corp., supra.*

The affirmative evidence, and past decisions of the Commission apparently treated as evidence, relied upon by the Commission, may be summarized as follows: (1) the definitions of crude oil contained in two technical dictionaries (J.S. 56); (2) the purportedly expert testimony of the difference between crude oil and petroleum products in the oil and gas industry (J.S. 63); (3) a definition of petroleum products quoted from the *Descriptions case* (J.S. 56); and (4) two decisions alegedly standing for the proposition that the Commission has always recognized the difference between a commodity and its products (J.S. 56). These factors will be considered briefly in the order stated.

There is not a proper foundation in the record for consideration of the Petroleum Dictionary definitions by the Commission. The dictionaries themselves are extra-record matter, neither introduced into evidence nor officially noticed by the Commission at the time of the hearing so as to afford Appellant an opportunity to cross-examine, explain or rebut their contents or validity. Under the circumstances, resort to these publications by the Commission as affirmative evidence was improper and prejudicial.

Normally, technical dictionary definitions are not persuasive in determining the meaning of a commodity descriptions in certificates issued by the Commission. *Scott Truck Line, Inc. v. United States* (D.C., Colo., 1958), 163 F. Supp. 118. It is the usage intended by the Commission, rather than the abstract meaning of words, which properly governs the interpretation of a certificate. *Salvino v. United States et al* (D.C., Wash., 1954), 119 F. Supp. 277. In *Black*

v. Interstate Commerce Commission (C.A. 5th, 1948), 167 F.2d 825 resort by the Commission to evidence of the usage of the phrase "machinery and machinery parts" in the motor carrier industry, rather than dictionary definitions, was approved by the Court.

Moreover, there is nothing to indicate that the dictionary definitions of crude oil relied upon by the Commission were related to its own official usage or usage in the motor carrier industry. Instead, the dictionaries, one published by the Petroleum Educational Institute and the other a publication of the University of Oklahoma Press (J.S. 56), appear to refer to the meaning of crude oil in the oil and gas industry, a meaning clearly irrelevant in the interpretation of Appellant's certificates. Nor are the dictionaries identified in the Commission's report as to date of publicaton, and there is consequently no basis of knowing whether they are relevant even in point of time to the period when Appellant acquired its certificates. Obviously, the technical meaning of crude oil in the petroleum production and refining industry as of the present or some indeterminate time in the past is of no probative value in the interpretation of the phrase "petroleum products" in the involved certificates.

The Commission relied upon the testimony of a professor-chemist of the University of Utah (J.S. 51), who was "familiar with all phases of the oil industry", and who testified as to the difference between crude oil and its products (J.S. 63). Since this testimony was obviously not related to the usage of terminology in the motor carrier industry, nor to official usage by the Commission, it is subject to the same irrelevancy as the petroleum industry dictionary definitions discussed above. An equal infirmity in the testimony is the fact that it was adduced at a hearing held April 2 and 3, 1957, and no effort was made to relate

the testimony back in time to the period in which Appellant's authority was granted. This lack of proper relevancy of the testimony appears, in fact, on the face of the Commission report itself, where the Commission was "impressed" that the term crude oil "refers" to the material which goes into the refinery (J.S. 63). What the term "refers" to now, or in 1957, is not necessarily what the term *referred* to in the days when Appellant received its certificates.

The inapplicability of the commodity definitions in *Descriptions in Motor Carriers Certificates*, Ex Parte No. MC-45, *supra*, to Appellant's certificates, has already been discussed. Briefly recapitulated, the supposed definition of petroleum products set forth therein was formulated long after Appellant acquired its certificates, and the case, by its own terms, was intended to apply only prospectively to commodity descriptions. Reliance on the *Descriptions* case is therefore not a rational, substantial basis upon which to conclude that Appellant's certficates were not intended to authorize the transportaion of crude oil.

In concluding that crude oil transportation was not intended to be authorized in the grant of petroleum products authority to Appellaat, the Commission relied, finally, on the premise that it had always recognized the difference between a commodity and its products in issuing certificates (J.S. 56, 57). Cited in support of this contention were *Humes Extension of Operations—Indiana*, 48 M.C.C. 455, and *Vaughan Interpretation of Certificate*, 52 M.C.C. 204. The same two cases were the sole authority relied upon by the District Court in stressing the apparent commodity-products dichotomy (J.S. 25, 26), and are cited again in the Government's Motion to Affirm (Motion, 6). Incredibly, however, while the Commission now asserts that it has always seen such a distinction, in the *Descriptions* case,

decided subsequently to both *Humes* and *Vaughan*, and the one decision which everyone concedes was intended to define the scope of certain commodity authorizations, the Commission specifically listed "coal tar" as embraced within the generic description "coal tar products."[22] It should be noted, also, that all but two of Appellant's certificates were issued prior to the *Vaughan* case, and all but three were issued prior to *Humes*. Neither *Vaughan* nor *Humes* involved an interpretation of petroleum products authority.

From the foregoing analysis of evidence in the reopened proceeding before the Commission, it is manifest that the Commission's finding that the grants of petroleum products authorities to Appellant were not intended to authorize the transportation of crude oil is not supported by substantial evidence of record. The factors relied upon by the Commission, unrelated as they are in both time and relevancy to a construction of the certificates involved, do not afford a rational basis for the conclusion made. Lacking a substantial, rational basis in the record, the Commission's affirmative conclusion collapses of its own weight.

[22] 61 M.C.C. 209, 296.

CONCLUSION

On the premises of this brief and the Jurisdictional Statement of Appellant, it is submitted that this appeal presents substantial questions and that plenary review by this Court is warranted. The Government's motion to affirm the judgment of the District Court should therefore be denied, and this Court should note its probable jurisdiction of the appeal.

Respectfully submitted,

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APPENDIX "A"

CHRONOLOGICAL LISTING OF DECISIONS OF THE COMMISSION EXPRESSLY APPLYING THE COMMODITY DESCRIPTIONS AND SERVICE AUTHORIZATIONS OF THE *CLASSIFICATION* CASE AS DEFINITIVE

Classification of Motor Carriers of Property, 2 M.C.C. 703, August 9, 1937.

Dimmick Common Carrier Application, 6 M.C.C. 697, 698, April 18, 1938.

Freer Brothers Motor Express Lines Common Carrier Application, 7 M.C.C. 203, 207, May 16, 1938.

Sweener Common Carrier Application, 9 M.C.C. 77, July 14, 1938.

Nemo Common Carrier Application, 9 M.C.C. 237, 238, July 29, 1938.

Contracts of Contract Carriers, 11 M.C.C. 693, 701, October 24, 1938.

Ruck Common Carrier Application, 12 M.C.C. 150, 152, November 18, 1938.

Holmes Common Carrier Application, 12 M.C.C. 377, 378, November 25, 1938.

Dunn Common Carrier Application, 12 M.C.C. 597, December 1, 1938.

Inman Common Carrier Application, 12 M.C.C. 693, 694, December 8, 1938.

Gerard Motor Express, Incorporated, Extension—Evansville, 9 M.C.C. 627, 630, December 20 1938.

Lundstrom Common Carrier Application, 13 M.C.C. 491, 498, January 6, 1939.

Consolidated Freight Lines, Incorporated, 11 M.C.C. 131, 133-134, January 11, 1939.

Bigsby Extension of Operations—Ohio, 14 M.C.C. 339, 341, February 23, 1939.

Carroll Common Carrier Application, 16 M.C.C. 109, 110, March 6, 1939.

McElhaney Common Carrier Application, 16 M.C.C. 349, 350, March 25, 1939.

Sgers Common Carrier Application, 18 M.C.C. 377, 378, May 6, 1939.

Kane Common Carrier Application, 20 M.C.C. 359, 360, June 19, 1939.

K & L Transportation Company—Purchase—L. C. Chastain, 25 M.C.C. 341, 342, July 7, 1939.

Practices of Motor Common Carriers of Household Goods, 17 M.C.C. 467, 469, 473, 474, July 17, 1939.

Cassens Transport Company, Extension of Operations, 18 M.C.C. 273, September 13, 1939.

Belgea, Extension of Operations—Heavy Machinery, etc., In the Pacific Southwest 24 M.C.C. 745, 747, August 20, 1940.

Langdon Common Carrier Application, 27 M.C.C. 391, 395, January 4, 1941.

Washburn Storage Company, Extension of Operations—Household Goods, 29 M.C.C. 116, 117, May 29, 1941.

Cole Company, Inc. Common Carrier Application, 32 M.C.C. 199, 209, January 1, 1942.

Watson—Purchase—Comet Motor Express Co., 40 M.C.C. 735, 737, May 22, 1946.

Nelson, et al—Control; C and U Tank Lines Inc.—Purchase—Comet Motor Express Co., 45 M.C.C. 175, 180, October 3, 1946.

Coastal Tank Lines, Inc. et al v. Charlton Bros. Transportation Company, Inc., 48 M.C.C. 289, June 4, 1948.

Nelson, et al—Control; C and U Tank Lines, Inc.—Purchase—Comet Motor Express Co., 55 M.C.C. 791, June 23, 1949.

APPENDIX "B"

DECISIONS OF THE INTERSTATE COMMERCE COMMISSION WHERE THE AUTHORITY GRANTED INCLUDED "REFINED PETROLEUM PRODUCTS"

Earl Bray Contract Carrier Application, 1 M.C.C. 167, October 26, 1936.

Edwards Contract Carrier Application, 1 M.C.C. 741, April 22, 1937.

Frei Contract Carrier Application, 3 M.C.C. 299, September 21, 1937.

Thompson, Contract Carrier Application, 4 M.C.C. 283, February 16, 1938.

Peake Oil Company Contract Carrier Application, 6 M.C.C. 83, February 10, 1938.

Schroetlin Contract Carrier Application, 7 M.C.C. 789, June 13, 1938.

Woodrow Brothers Contract Carrier Application, 8 M.C.C. 259, July 22, 1938.

Earl Bray Extension of Operations, 8 M.C.C. 355, July 9, 1938.

Peake Oil Company Contract Carrier Application, 10 M.C.C. 38, October 11, 1938.

Palmer Contract Carrier Application, 11 M.C.C. 734, October 25, 1938.

Collett Common Carrier Application, 11 M.C.C. 789, October 29, 1938.

Baum Extension of Operations, 13 M.C.C. 89, December 23, 1938.

Baum Extension of Operations, 14 M.C.C. 345, May 3, 1939.

Dovel Contract Carrier Application, 14 M.C.C. 357, May 9, 1939.

Harriss Extension of Operations—Oklahoma, 17 M.C.C. 309, June 28, 1939.

Woodrow Brothers Extension of Operations—Wyoming, 17 M.C.C. 329, June 28, 1939.

Kirk Contract Carrier Application, 20 M.C.C. 311, June 15, 1939.

Nichols Extension of Operations—Kansas—Nebraska, 21 M.C.C. 242, December 29, 1939.

Earl Bray Extension of Operations—Kansas—Oklahoma, 21 M.C.C. 601, February 3, 1940.